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No. 00-1611

In The
Supreme Court of The United States

MIGUEL RICHARDSON,
Petitioner,

v.

GARY JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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36 pp

QUESTIONS PRESENTED

1. Whether a petitioner can complain about a trial court's refusal to submit a supplemental mitigation instruction based on evidence that was not presented in any form at trial, much less evidence that was unknown at the time of trial.

2. Whether a state appellate court's application of harmless error doctrine to a non-constitutional, state law violation relating to the *sua sponte* dismissal of a biased veniremember implicates a constitutionally protected right.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Course of Proceedings and Disposition Below	3
B. Statement of Facts	5
1. Guilt-Innocence Phase	5
2. Punishment Phase	7
REASONS FOR DENYING THE WRIT	14
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THE COURT'S ATTENTION.	14
II. THE REFUSAL OF THE TRIAL COURT TO SUBMIT REQUESTED SUPPLEMENTAL JURY INSTRUCTIONS AT THE PUNISHMENT PHASE OF TRIAL DID NOT PRECLUDE RICHARDSON FROM OFFERING ADDITIONAL EVIDENCE AT TRIAL.	16

TABLE OF CONTENTS, CONTINUED

Page

A. Richardson cannot base a complaint regarding a refusal to submit requested jury instructions on evidence that was not presented at trial, much less evidence that was unknown by trial counsel. 16

B. The evidence unknown by trial counsel was not constitutionally relevant mitigating evidence. 20

C. Richardson's claim regarding an entitlement to a mitigation instruction based on the evidence actually presented at trial is not properly before the Court. 22

III. THE APPLICATION OF HARMLESS ERROR DOCTRINE TO A STATE LAW VIOLATION RELATING TO THE EXCLUSION OF A POTENTIAL JUROR ON NONCONSTITUTIONAL GROUNDS DOES NOT RAISE A FEDERAL CONSTITUTIONAL QUESTION. 24

CONCLUSION 29

TABLE OF AUTHORITIES

Cases	Page
Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	24
Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995)	19
Andrews v. Collins, 21 F.3d 612 (5th Cir. 1994), *cert. denied*, 513 U.S. 1114 (1995)	19
California v. Brown, 479 U.S. 538 (1987)	21
Clark v. Collins, 19 F.3d 959 (5th Cir.), *cert. denied*, 513 U.S. 966 (1994)	22
Cook v. Morrill, 783 F.2d 593 (5th Cir. 1986)	26
Delo v. Lashley, 507 U.S. 272 (1993)	18
Demouchette v. Collins, 972 F.2d 651 (5th Cir.), *cert. denied*, 505 U.S. 1246 (1992)	19
Engle v. Isaac, 456 U.S. 107 (1982)	18
Franklin v. Lynaugh, 487 U.S. 164 (1988)	21
Gray v. Mississippi, 481 U.S. 648 (1987)	27,28
Hall v. State, 541 So.2d 1125 (Fla. 1989)	20
Hohn v. United States, 118 S. Ct. 1969 (1998)	2
Lackey v. Scott, 28 F.3d 486 (5th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995)	19
Lockett v. Ohio, 438 U.S. 586 (1978)	18
Madden v. Collins, 18 F.3d 304 (5th Cir. 1994), *cert. denied*, 513 U.S. 1156 (1995)	21
Marquez v. Collins, 11 F.3d 1241 (5th Cir.), *cert. denied*, 513 U.S. 881 (1994)	19
May v. Collins, 904 F.2d 228 (5th Cir. 1990)	19
May v. Collins, 948 F.2d 162 (5th Cir. 1991)	19
Motley v. Collins, 18 F.3d 1223 (5th Cir.), *cert. denied*, 513 U.S. 960 (1994)	22
Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995), *cert. denied*, 518 U.S. 1022 (1996)	26,27
Penry v. Lynaugh, 492 U.S. 302 (1989)	*passim*
Rogers v. Lodge, 458 U.S. 613 (1982)	23
Ross v. Oklahoma, 487 U.S. 81 (1988)	28
Saffle v. Parks, 494 U.S. 484 (1990)	21

TABLE OF AUTHORITIES, CONTINUED

Cases	**Page**
Skipper v. South Carolina, 476 U.S. 1 (1986)	20
State v. Evans, 584 P.2d 1149 (Ariz. 1978)	20
Teague v. Lane, 489 U.S. 288 (1989)	20,24,28
(Michael) Williams v. Taylor, 529 U.S. 420 (2000)	14
(Terry) Williams v. Taylor, 529 U.S. 362 (2000)	15
Witherspoon v. Illinois, 391 U.S. 510 (1968)	27,28

Constitutions, Statutes and Rules

U. S. Const., amend. V	2
U. S. Const., amend. VI	2
U. S. Const., amend. VIII	2
U. S. Const., amend. XIV	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254	15
TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(10)	25
TEX. CODE CRIM. PROC. ANN. art. 37.071	3
Sup. Ct. R. 10	14

Miscellaneous

Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA")	*passim*

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RESPONDENT'S BRIEF IN OPPOSITION

Petitioner Miguel Richardson was properly convicted and sentenced to die for the execution-style murder(s) of John Ebbert (and Howard Powers) during the course of a robbery.[1] The United States Court of Appeals for the Fifth Circuit denied Richardson's application for a certificate of appealability ("COA"). This Court should affirm the judgment of the Fifth Circuit because the state court decision

[1] For clarity, the petitioner will be referred to as "Richardson" and the respondent as "the Director."

that the Fifth Circuit reviewed regarding the claims presented was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying Richardson's COA from the judgment of the district court denying federal habeas relief is attached to the petition. *Richardson v. Johnson*, No. 00-50418, slip op. (5th Cir. Jan. 23, 2001); PA 1:1-12.[2]

JURISDICTION

Richardson seeks to invoke the jurisdiction of the Court to review the circuit court's denial of a COA under the provisions of 28 U.S.C. §1254(1). *See Hohn v. United States*, 118 S. Ct. 1969 (1998).

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[2] "PA" refers to the Appendix filed by Petitioner, by volume and page numbers. "Tr" refers to the documents filed in the underlying cause, or transcript, by page number. "SR" refers to the transcription of the trial proceedings, or statement of facts, preceded by volume number and followed by page number. "SHTr" refers to the transcription of the hearing conducted during state habeas proceedings, or statement of facts, preceded by volume number and followed by page number.

CONSTITUTIONAL PROVISIONS INVOLVED

Richardson bases his claims upon the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF CASE

A. Course of Proceedings and Disposition Below

In May 1981, Richardson was charged by an indictment returned in Bexar County, Texas, with the capital offense of intentional murder of John Ebbert during a robbery. Tr 2. A jury found Richardson guilty of the capital offense on September 16, 1981, rejecting a lesser-offense instruction on murder. Tr 10, 196, 198. A separate punishment hearing ensued, and, on September 18, 1981, the jury answered affirmatively the two special issues submitted pursuant to Article 37.071 of the Texas Code of Criminal Procedure. Tr 10, 223; PA 2:317-18. In accordance with state law, the trial court assessed punishment at death. Tr 10, 199-200.

Appeal was automatic to the Texas Court of Criminal Appeals, which affirmed the conviction and sentence on October 28, 1987. *Richardson v. State*, 744 S.W.2d 65 (Tex. Crim. App. 1987); PA 1:229-88. On July 3, 1989, this Court, however, granted Richardson's petition for writ of certiorari, vacated the judgment, and remanded the action for further consideration. *Richardson v. Texas*, 492 U.S. 914 (1989); PA 1:228. On remand, the Court of Criminal Appeals again affirmed the conviction and sentence. *Richardson v. State*, 886 S.W.2d 769 (Tex. Crim. App. 1991); PA 1:197-226.

Rehearing was denied September 18, 1991. *Id.* On June 28, 1993, this Court again, however, granted Richardson's petition for writ of certiorari, vacated the judgment, and remanded the action for further consideration. *Richardson v. Texas*, 509 U.S. 917 (1993); PA 1:227. On remand, the Court of Criminal Appeals again affirmed the conviction and sentence. *Richardson v. State*, 901 S.W.2d 941 (Tex. Crim. App. 1994): PA 1:189-96. Rehearing was denied by the Court of Criminal Appeals on September 21, 1994, and this Court denied certiorari review on June 26, 1995. *Richardson v. Texas*, 515 U.S. 1162 (1995); PA 1:189.

Richardson filed an application for state writ of habeas corpus with the convicting court in December 1996. After an evidentiary hearing, the trial court entered findings of fact and conclusions of law recommending that habeas relief be denied. PA 2:445-79. The trial court's findings were adopted by the Court of Criminal Appeals on June 10, 1998. PA 1:289-95. Richardson again filed a petition for writ of certiorari, which this Court denied on November 30, 1998. *Richardson v. Texas*, 525 U.S. 1021 (1998).

Richardson proceeded into federal court by filing a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division, on October 8, 1998. PA 1:30. By orders entered on March 28, 2000, the district court denied habeas relief and COA. PA 1:17-186. On April 16, 2000, the district court denied post-judgment relief sought by Richardson and again denied COA. PA 1:13-16. The lower court similarly denied COA on January 23, 2001. PA 1:1-12. Richardson did not move for rehearing. Rather, he filed the instant petition for writ of certiorari on April 20, 2001.

B. Statement of Facts

1. Guilt or Innocence

The Court of Criminal Appeals adequately summarized the facts of Richardson's offense in its original opinion affirming the conviction and sentence on direct appeal:

> [John Ebbert] was a security guard at the Holiday Inn in San Antonio. He and another security guard [Howard Powers] were dispatched early in the morning of March 31, 1979, to investigate a complaint from a guest in room 494 that someone was trying to break into her room. Room 494 was occupied by three women from Mexico City. Shortly after the front desk clerk had sent the two unarmed security guards to investigate the complaint, the guest in room 494 called again and stated she thought she had heard gunshots. Eventually the front desk clerk found the bodies of the two security guards lying in a first floor stairwell. [Powers] had his hands handcuffed behind his back and both had been shot at close range with a .38 caliber Arminius

Titan Tiger pistol. [FN 4]. [Richardson] had acquired a .38 caliber Arminius Titan Tiger pistol several days earlier.

> [FN 4. A firearms and toolmark examiner for the San Antonio Police Department testified that the make of the pistol used in the offense could be and was determined by bullets recovered from the body of the victim].

The evidence also reflected that at the time of the offense [Richardson] and the three young women who were traveling with him occupied the room across the hall from room 494. The three young women, seventeen-year-old Victoria Franklin, sixteen-year-old Rhonda Bearden, and seventeen-year-old Lisa Laursen, were working as prostitutes in the various cities the group visited. All three women testified at the trial. On the evening before the offense, [Richardson] had mentioned that one of the women from Mexico City was wearing what he considered to be expensive jewelry. According to Franklin's testimony, [Richardson] awakened her on the morning of the offense and told her he had disguised himself and, armed with the .38 caliber pistol, had attempted to gain entry to the room occupied by the women from Mexico City. Before gaining entry, he was interrupted by the two security guards. The guards were escorting [Richardson] down the stairs to the

> front desk in order to establish his identity when [Richardson's] weapon, which was in his waistband, fell to the floor. He grabbed the gun, handcuffed one of the guards, took their money, shot and killed both of them, and returned to his room. Upon his request, Franklin went to the scene of the murders and wiped the area with a towel to remove any fingerprints. The victims had not yet been discovered and Franklin saw them lying in the stairwell. She then returned to the room and disposed of the bullets and spent shells by flushing them down the toilet.
>
> [Richardson] and Franklin later told Bearden about the murders. While in Colorado awaiting extradition to Texas, [Richardson] also confessed to Mark Stanley Seiver, another inmate.

PA 1:248-50.

2. Punishment Phase

State's evidence

In 1973, Richardson was convicted of possession of stolen mail. 6 SR 59, 66. The parole officer assigned to Richardson's case testified that he was regularly asked to predict future behavior and that he considered Richardson to be a high risk and dangerous. 6 SR 64-65. Although Richardson was sentenced under the provisions of the Federal Youth Corrections, his parole officer did not recommend him for, and as a consequence he did not receive, a certificate of expungement. 6 SR 67-68.

In January 1979, Mary Wilkinson and several of her friends returned to her home in Oklahoma City after attending an art show and having dinner and were confronted by Richardson and two others who entered beneath the closing garage door. 6 SR 170-72. While the other two perpetrators got the two women out of the back seat and took their coats and jewelry, Richardson asked whose house it was and ordered Wilkinson to disarm the security system. 6 SR 172. According to Wilkinson, Richardson led the group, directing the others and carrying the only gun. At one point, he put the gun to the head of one of her friends and threatened to kill them all if Wilkinson didn't tell the woman who was shouting to shut up. 6 SR 174. Richardson tied-up Wilkinson face down on her bedroom floor while he took the pillow cases off the bed and stole her jewelry and silverware. 6 SR 176. Then he took her to the guest bedroom where her companions were and put her face-down on the bed. Wilkinson could hear the perpetrators going through the closet in that room. Richardson then raped Wilkinson. 6 SR 177.

While Richardson was in the Denver County Jail before being extradited to Texas for the instant offense, he lodged more than twenty complaints about physical ailments, and on each occasion he was transported to Denver County Hospital. 6 SR 35-36. On November 12, 1979, after receiving a treatment slip ordering Richardson's return from the hospital to the county jail, Officer Joe Sanger escorted Richardson from a hospital room to a holding cell at the hospital. After he was in the cell and his leg irons had been removed, Richardson grabbed Sanger's gun. A life or death struggle ensued where the officer's finger wedged behind the trigger was the only thing that prevented Richardson from

pulling the trigger of the gun he pointed at Sanger. Richardson told Sanger, "You may as well give up because I have the hammer back and I have control." 6 SR 37-39. During the struggle, he also threatened, "I'll kill any white mother fucker, especially any cop that gets in my way." 6 SR 43. After Richardson was subdued, Sanger was hospitalized for a torn rotator cuff of the right shoulder. 6 SR 40.

On April, 20, 1980, Richardson attacked the shift commander at the Denver County Jail where he was being held pending his extradition to Texas. Richardson became violent and agitated in the shift commander's office after being informed that he would be placed in isolation, and he attempted to strike the officer with a fire extinguisher. 6 SR 17, 31. He threatened that if he were not allowed to go to the gym or given some type of recreation that he would hurt someone when he first got the opportunity and that "if he saw daylight he would hurt someone to get out." 6 SR 18. Following the attack, Richardson was maced and carried to isolation. Once in isolation, he stated that he would no longer struggle, but as the escorting officers left his cell, Richardson hit one of them on the left side of his jaw. 6 SR 31. After Richardson was again brought under control and the officers left his cell, he threatened them, "If I ever get on the street, I'll kill every one of you." 6 SR 32.

On June 19, 1980, Richardson again attempted to escape from Denver authorities after being taken to the hospital. This time, after his handcuffs were removed, Richardson stabbed Deputy Sheriff Kenneth Hall in the neck with a long instrument that had been concealed in his pants. 6 SR 77. The instrument penetrated the right side of Hall's neck to his spine. 6 SR 75.

Robert Rast, a clinical psychologist, testified that many of the acts set forth in the State's hypothetical delineating the sequence of events established by the guilt-innocence and punishment phase evidence were sociopathic and that the person described in the hypothetical would continue to be a danger to others both outside and in prison. 6 SR 207-09. Rast described a sociopathic or psychopathic person as exhibiting a personality disorder rather than suffering from mental illness. The sociopathic personality was described as lacking a conscience, manipulative, self-centered, not learning from previous experience, and lacking emotional depth. 6 SR 203-04.

Robert Jones, an Oklahoma City Police Department detective, testified that Richardson's reputation for being a peaceful, law-abiding citizen was terrible. 6 SR 53.

Defense evidence

Norm Kabelitz, pastor of the Redeemer Lutheran Church, had known Richardson since he was eleven years old. 6 SR 244-45. Richardson had served as an acolyte in Kabelitz's church. Reverend Kabelitz described Richardson's family as a "well put together family [with] a very strong father image." Richardson's father was a strict disciplinarian and his mother a national leader in the Lutheran Church. 6 SR 250. The reverend identified desegregation as one of the major issues confronting Oklahoma City at the time, and, although he described Richardson as closed and uncommunicative of his feelings, stated that he knew that the integration of schools must have caused Richardson to question authority figures who engaged

in violence and lawlessness directed against integration.[3] 6 SR 248-52. Kabelitz also observed that Richardson's inability to read well affected his self image and peer relationships. 6 SR 245.

According to Reverend Kabelitz, Richardson had an open and attractive personality. On one occasion he acted as emcee for a fund raising fashion show held at the church. Young girls from the community, but not known to Kabelitz, "obviously" attended the show because they were fascinated by and attracted to Richardson. 6 SR 256-57. Richardson also contributed religious drawings to the parish's annual art festival. Kabelitz viewed Richardson's handling of crucifix themes, suffering, and pain as revealing that he was learning to deal with the world. 6 SR 259. His poetry, according to Kabelitz, revealed an ability or willingness to help others. On cross-examination, Kabelitz credited Richardson with "gift insight" resulting from his own suffering and stated that he first saw signs of this gift in 1978. 6 SR 268.

Lee Griswold, an optometrist and lay minister in the Catholic Church, began visiting Richardson at the Denver County Jail at the request of Richardson's mother. By the time of trial, Griswold had known Richardson for about a year and a half. 6 SR 84-86. During their weekly visits, Richardson and Griswold discussed religion, and Richardson told Griswold that he wanted to be saved. Richardson also "passed on" what he learned about religion to other inmates.

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[3] Richardson's Sunday school teacher testified that Oklahoma City had problems integrating schools and that people at the church counseled Richardson and others about integration. 6 SR 241-42.

6 SR 88-90. Cross-examination revealed that Richardson's attack on Deputy Hall occurred after he professed religious conversion. 6 SR 94.

Wayne Bernard, minister at the Randolph Church of Christ in Universal City and volunteer chaplain at the San Antonio Jail, had known Richardson six months. During that time Richardson attended Bible study group and, after his baptism at the jail, Bernard observed "real conversion within Miguel" and no acts of violence. Bernard identified three religious pictures as Richardson's, and they were entered into evidence. 6 SR 272-77.

Herbert Holston, minister at the Mount Zion First Baptist Church, visited Richardson four or five times at the jail in San Antonio. According to Holston, Richardson had a good grasp of major biblical concepts. 6 SR 119-21.

Linda Cowart, a friend who had known Richardson for three or four years, described Richardson as a happy go lucky person whom she had never known to be violent. When asked whether Richardson had any special talents, Cowart stated that she had seen drawings that he had done on the outside of envelopes and had read some of his poetry, and "[i]n visits he can come off with things just right off the top of his head that are kind of–oh, little funny type things." Cowart was going blind from diabetes, and every time she got a letter from Richardson or talked to him, he asked about her eyesight. 6 SR 99-102.

Another friend, Cynthia Parks Lee, met Richardson at a lounge in Denver and, by the time of trial, had known him for four or five years. 6 SR 105. Lee described Richardson

as "very pleasant and just real jolly"; she had never known him to be violent, mean, or vicious. 6 SR 107. As an example of the "warmth and feeling" exhibited by Richardson toward others, Lee described his friendship with Karen Cracken, a fourteen-year-old adopted child of an alcoholic mother. According to Lee, Cracken suffered from rheumatic fever and a disease that distorted the growth of her bone, and Richardson's letters and calls from jail changed Cracken's life and allowed her to withstand the teasing of schoolmates. Lee described that Richardson was a gifted artist and poet. 6 SR 110.

Richardson's sister, Paquita, described her family as a typical middle class family and their childhood as close and normal. 6 SR 130, 137. Richardson's father was a civil servant at Tinker Air Force Base; his mother was a homemaker until she went to work as a customer relations person at Hertz when Richardson was in high school. 6 SR 126. Paquita described her father as strict but understanding and agreed with the prosecutor's description of her parents as good and decent people. 6 SR 132, 137. They grew up on a "sort of farm" on which there were two ponds and two tree houses, and each of the nine children had his or her own pet. Richardson had a horse. 6 SR 129. Their land was nearly self-supporting and they "ate well." 6 SR 130.

Richardson and his sister started school in an all black school, but when their mother discovered that they lived in the district of an all white school, Pleasant Hill, she enrolled her children there. After finishing the eighth grade at Pleasant Hill, Richardson attended Dale City High School, where fewer than twelve blacks were enrolled. According to Paquita, there was no racial conflict at Dale City High School

when she and her brother went there. Richardson got along well with the other students, had lots of friends, was an average student, and played football. 6 SR 130-32.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THE COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. As an initial matter, Richardson filed his initial federal habeas petition in October 1998, well after enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA"). Accordingly, the AEDPA standard of review guides this Court's review of the questions presented. *See (Michael) Williams v. Taylor*, 529 U.S. 420, 429 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case."). Under the amended provisions of Section 2254(d), a state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). Section 2254(d)(1) provides the standard of review for questions of law and mixed questions of law and fact. *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The Court's decision in *(Terry) Williams* makes clear that a federal court's discretion to grant a writ of habeas corpus is limited and the court may only issue a writ if the state court's decision was "contrary to" or "involved an unreasonable application of" established federal law. 529 U.S. at 412-13.

Under the "unreasonable application" clause, the Court may grant the writ if the state court identifies the correct governing legal principle but applies it incorrectly, or extends or refuses to extend a legal principle to an area outside the scope intended by this Court. *Id.* at 408, 413. Furthermore, the state court's application of the law must be "unreasonable" in addition to being merely "incorrect." *Id.* at 411. The Court explained, "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

Under the "contrary to" clause of section 2254(d)(1), a federal court may grant the writ if the state court has arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of

materially indistinguishable facts. *Id.* at 412-13.

For the reasons discussed below, and in light of the AEDPA standard of review, Richardson fails to advance a compelling reason for this Court to review his case, and none exists. Accordingly, this Court should decline to exercise its certiorari jurisdiction to review Richardson's claims.

II.

THE REFUSAL OF THE TRIAL COURT TO SUBMIT REQUESTED SUPPLEMENTAL JURY INSTRUCTIONS AT THE PUNISHMENT PHASE OF TRIAL DID NOT PRECLUDE RICHARDSON FROM OFFERING ADDITIONAL EVIDENCE AT TRIAL.

A. Richardson cannot base a complaint regarding a refusal to submit requested jury instructions on evidence that was not presented at trial, much less evidence that was unknown by trial counsel.

After the parties had rested and closed their cases on punishment, Richardson submitted five proposed jury instructions regarding mitigating evidence. 6 SR 280-81. PA 2:301-10. Each of these five proposed mitigation instructions essentially told the jurors that they could change a "yes" answer on a special issue to a "no" answer if the jurors determined that evidence of Richardson's character and/or the circumstances of the offense mitigated against imposition of the death penalty. PA 2:301-10. Richardson asserts that these proposed instructions would have satisfied the defect

found in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*),[4] and that the refusal of the trial court to submit one of his proposed mitigation instructions prevented his counsel from developing and presenting evidence that Richardson had endured childhood physical and sexual abuse.

Initially, as a factual matter, it is an absurd proposition that the trial court's actions precluded Richardson from developing or presenting evidence of purported childhood physical and sexual abuse at his trial. Richardson had already rested and closed his case before the trial court ruled on the requested mitigation instruction. Moreover, during state habeas proceedings, trial counsel testified that his interviews with Richardson and Richardson's family members failed to reveal a history of possible physical or sexual abuse. PA 2:378-79, 390; 5 SHTr 577, 601; *see* 5 SHTr 605, 609 ("Well, I really didn't make that choice [between presenting a theory regarding child abuse rather than a theory regarding a positive upbringing by a "normal loving family"] because, number one, I didn't know about the child abuse evidence."). Trial counsel also testified that: he did not recall having discussed the proposed mitigation instructions with the trial court judge prior to the charge conference; he was aware that at least one district judge in

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[4] Specifically, Richardson states that this type of mitigation instruction is "of the type later endorsed in *Penry I*." Petition at 10. Ironically, the firm representing Richardson is representing Johnny Paul Penry in a separate matter before this Court claiming that such an instruction fails to satisfy *Penry I* and is an "unconstitutional nullification instruction." *See Penry v. Johnson*, No. 00-6677.

the county had previously granted such an instruction; and he did not know whether such an instruction had been presented (in prior cases) to the judge presiding at Richardson's trial. 5 SHTr 563, 565. For these reasons, it is utterly disingenuous for Richardson to claim that the trial court's refusal to submit one of Richardson's proposed mitigation instructions interfered with strategic decisions at trial. PA 1:15; *see also Engle v. Isaac*, 456 U.S. 107 (1982) (perceived futility of raising an objection or legal argument will not excuse a procedural default even if reasonable counsel would have chosen to forego the objection or argument).

Further, a defendant cannot base a complaint regarding a trial court's denial of requested mitigation instructions on evidence he failed to present at trial in support of the instruction in the first instance. This Court has consistently held that "the sentencer must be allowed to consider in mitigation 'any aspect of a defendant's character or record and any of the circumstances of the offense *that the defendant proffers* as a basis for a sentence less than death.'" *Delo v. Lashley*, 507 U.S. 272, 275 (1993) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)) (emphasis in *Delo*). Even in *Penry I*, this Court found that "there is no constitutional infirmity in a [sentencing] procedure that allows a jury to recommend mercy based on the mitigating evidence *introduced by a defendant*." *Id.* (quoting *Penry I, supra*, 492 U.S. at 327) (emphasis in *Delo*). This Court further explained, "[W]e never have suggested that the Constitution requires a state trial court to instruct the jury on mitigating circumstances in the absence of any supporting evidence." *Id.* Accordingly, as the lower court has repeatedly found, it follows that a criminal defendant is not entitled to habeas relief on the basis of mitigating

evidence that was never presented at trial. *See* PA 1:87 n.144 (citing nine published Fifth Circuit decisions rejecting the claim).[5]

For these reasons, the lower federal courts were correct in finding that the AEDPA forecloses relief. PA 1:9,

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[5] Additional published decisions of the Fifth Circuit have rejected this claim. *Allridge v. Scott*, 41 F.3d 213, 223 (5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995); *Marquez v. Collins*, 11 F.3d 1241, 1248 (5th Cir.), *cert. denied*, 513 U.S. 881 (1994); *Demouchette v. Collins*, 972 F.2d 651, 652-53 (5th Cir.), *cert. denied*, 505 U.S 1246 (1992). Richardson claims that his case is distinguishable from the prior Fifth Circuit decisions rejecting this claim because he actually developed a record of the evidence that had not been presented to the jury. Although some of the published decisions may not clearly state what formed the evidentiary basis for the unproffered evidence, some of the published decisions mention the form of evidence. For example, in *Lackey v. Scott*, the petitioner's additional mitigating evidence was presented during a federal evidentiary hearing. 28 F.3d 486, 489 n.3 & 490 (5th Cir. 1994), *cert. denied*, 513 U.S. 1086 (1995). The same appears to be the case in *Demouchette*, *supra*. Similarly, in *Andrews v. Collins*, the petitioner's additional mitigating evidence was presented during a state habeas hearing. 21 F.3d 612, 617 n.6, 619 n.10, 623 n.20, 624, 630 (5th Cir. 1994), *cert. denied*, 513 U.S. 1114 (1995). Finally, in *May v. Collins*, the petitioner presented affidavit testimony from a psychiatrist regarding childhood abuse and brain damage. 948 F.2d 162, 164-65 (5th Cir. 1991); *see also May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990).

15, 87-92; PA 2:448.[6] Relief is also foreclosed by *Teague v. Lane*, 489 U.S. 288 (1989).

B. The evidence unknown by trial counsel was not constitutionally relevant mitigating evidence.

Additionally, apart from the fact that evidence of purported childhood physical and sexual abuse was not presented at trial, much less even known by trial counsel, the additional evidence at issue was not constitutionally relevant mitigating evidence. The Court recognized in *Skipper v. South Carolina* that not everything a defendant introduces in mitigation of punishment is "relevant mitigating evidence." *Skipper*, 476 U.S. 1, 7 n.2 (1986). Evidence of a defendant's character or background attains constitutionally mitigating relevance to his culpability for the crime only if it reflects a reduced culpability, *i.e.*, that the capital murder is to some degree attributable to those aspects of his character or background proffered in mitigation of punishment:

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[6] Richardson asserts that he is entitled to relief on this claim because "the decisions of the Fifth Circuit, the District Court, and the state habeas courts, are in conflict with *Hall* and *Evans*." Petition at 17 (citing *Hall v. State*, 541 So.2d 1125 (Fla. 1989) and *State v. Evans*, 584 P.2d 1149 (Ariz. 1978)). Even if this were true, which it is not, this case is before the Court under the AEDPA standard of review which requires a conflict with "clearly established" federal law as determined by *this* Court. Regardless, both *Hall* and *Evans* concerned situations where consideration of mitigation evidence was limited to statutorily enumerated mitigating circumstances. *Hall*, 541 So.2d at 1126; *Evans*, 584 P.2d at 1153.

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse . . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.

Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (emphasis in original)); *see also Penry I*, 492 U.S. at 319. Thus, unless the defendant can demonstrate some connection between his crime and his proffered evidence, he does not show that his culpability is reduced. *See Madden v. Collins*, 18 F.3d 304, 307 (5th Cir. 1994) (finding that in contrast to Madden's evidence of a personality disorder, a learning disability, and a troubled childhood, in Penry "there was a clear nexus between Penry's handicap and his criminal act"), *cert. denied*, 513 U.S. 1156 (1995). Without a nexus between the crime and the defendant's proffered mitigation evidence, such evidence can only provide a basis for the jury to exercise sympathy for the defendant, and a decision based only on sympathy cannot be a reasoned moral response to the defendant's culpability. *See Saffle v. Parks*, 494 U.S. 484, 492-93 (1990).[7] Accordingly, even had Richardson's counsel

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[7] During the state habeas hearing, Dr. Joseph Eubanks, a neuropsychologist called as a witness by Richardson, was asked, "Are you here today, Dr. Eubanks, to testify that there

discovered and presented evidence of childhood abuse, that evidence, without more, is not relevant to his culpability for his crime and could have only provided a basis for the jury to exercise sympathy or mercy, to which Richardson is not constitutionally entitled. *Id.* at 492-93.[8]

C. Richardson's claim regarding an entitlement to a mitigation instruction based on the evidence actually presented at trial is not properly before the Court.

Richardson also asserts that evidence he presented at trial of "a troubled childhood, racial violence in school, religious devotion and kindness to others" was beyond the scope of the special issues and therefore he was entitled to a mitigation instruction. In the lower court, Richardson's sole mention of the evidence in the record in relation to a *Penry I* claim was in a footnote. In that footnote, Richardson stated

> . . . [that in] considering whether the evidence adduced at the state habeas hearing would have

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is such a nexus between the history of child abuse, if it occurred, and the crime?" Dr. Eubanks replied, "No, I can't be." 5 SHTr 463.

[8] Additionally, because behavioral problems which can stem from a history of childhood physical and sexual abuse have the possibility of being successfully treated, such evidence is not beyond the scope of the Texas special issues. *Clark v. Collins*, 19 F.3d 959, 962-63 (5th Cir.), *cert. denied*, 513 U.S. 966 (1994); *Motley v. Collins*, 18 F.3d 1223, 1234-35 (5th Cir.), *cert. denied*, 513 U.S. 960 (1994).

> required a *Penry* instruction, the Court should also recall that the judges who have previously reviewed this case were not unanimous in their determination that the evidence *already in the trial record* did not require a *Penry* instruction.

See Memorandum of Law in Support of Petitioner's Motion for COA at 57-58 n.10 (emphasis in original). Richardson then briefly summarized the procedural history of his case on direct appeal following the two remands from this Court. *Id.* Richardson did not inform the lower court what evidence "already in the trial record" he was referring to nor did he cite any legal authorities to support an entitlement to a mitigation instruction based on this undefined trial record evidence. *Id.*

Further, in his "Issues Presented For Review" section, Richardson stated that his mitigation instruction claim was:

> Whether the trial court's instructions to the jury prevented Petitioner-Appellant's trial counsel from introducing potentially mitigating evidence for fear that the instructions circumscribed the jury's ability to consider it as such.

Id. at 1. The lower court made no mention of Richardson's passing reference to any type of claim based on the evidence "already in the trial record," PA 1:9, and Richardson did not seek rehearing on any issue. For all these reasons, Richardson's claim is not properly before the Court. *See Rogers v. Lodge*, 458 U.S. 613, 628 n. 10 (1982) (holding that an issue which was "not properly raised in the Court of

Appeals and was not addressed by that court" will not be considered by United States Supreme Court); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970) (same).[9]

III.

THE APPLICATION OF HARMLESS ERROR DOCTRINE TO A STATE LAW VIOLATION RELATING TO THE EXCLUSION OF A POTENTIAL JUROR ON NON-CONSTITUTIONAL GROUNDS DOES NOT RAISE A FEDERAL CONSTITUTIONAL QUESTION.

Richardson's second, and final, question for review concerns the exclusion of potential juror William Noble. Noble was excused *sua sponte* by the trial court after he *invited* the prosecutor to explore the issue of bias then stated that he was a journalist by profession, took all the newspapers, and had already formed an opinion as to Richardson's guilt or innocence:

> [Prosecutor]: I'm not asking you to not contradict yourself or to contradict yourself, I'm asking you just to tell me just as honestly as you can so that I know whether or not you can sit here as a fair and unbiased juror and do the job that the jurors must do?

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[9] Even were the claim properly before the Court, the lower district court's opinion aptly demonstrates that relief is foreclosed under the AEDPA and *Teague v. Lane*, *supra*. PA 1:56-87, 90.

[Noble]: If I were a juror I would try to serve to the best of my ability. That's what I can say.

[Prosecutor]: All right.

[Noble]: You used a couple of words there, bias and impartial that I think you might want to pursue.

[Prosecutor]: Well, are you biased in some manner about this case?

[Noble]: Well, I have read quite a bit about it. And I feel that I have already prejudged the case. I mean I take all the newspapers. I'm a journalist by profession and I know – I don't disregard what I see in the paper.

[Court]: Have you already formed an opinion as to the guilt or innocence?

[Noble]: Yes, Your Honor. I think it's only fair that I say that I have formed an opinion.

[Court]: You will be excused Mr. Noble. You can return to the Central Jury Room. They will discharge you from there.

PA 2:326-27. On direct appeal, the Court of Criminal Appeals found the trial court's exclusion of Noble was error under state procedural law, TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(10), because the trial court failed to inquire whether

Noble's pre-formed opinion regarding Richardson's guilt would influence his verdict. PA 1:240-41. Nevertheless, the Court of Criminal Appeals held the error was harmless. PA 1:246-27. Richardson asked both the lower federal courts to elevate the state law error of the trial court as found by the Court of Criminal Appeals to a federal constitutional violation. The lower federal courts' rejection of that request was entirely correct.

First, it is readily apparent that the trial court believed Noble's explicit statements that he had prejudged the issue of guilt or innocence, that he had read about the case in the newspaper, and that he does not disregard what he reads in the newspapers. Thus, as the district court noted, the trial court made a finding of juror bias, which is entitled to a presumption of correctness. PA 1:97, 99-100. The only error committed by the trial judge in ultimately excluding this biased juror was failing to make an additional inquiry required by *state* law. However, it is settled that violations of state procedural rules simply do not state a claim for federal habeas corpus relief. *See Cook v. Morrill*, 783 F.2d 593, 596 (5th Cir. 1986) (federal habeas courts "do not sit as a 'super' state supreme court in a habeas corpus proceeding to review errors under state law") (citations omitted); PA 1:97. Accordingly, for this reason alone, the state courts' application of a harmless error analysis to this state law violation is simply immune from federal habeas corpus attack. *Cf. Nichols v. Scott*, 69 F.3d 1255, 1288 (5th Cir. 1995) (finding no prejudice from counsel's failure to object to alleged improper jury shuffle; claim that alternate juror, "who would have been reluctant to impose capital punishment," would have been the twelfth juror was "purely speculative and is insufficient to establish prejudice"), *cert.*

denied, 518 U.S. 1022 (1996).[10]

Further, Richardson's attempt to elevate this state law violation to a federal constitutional violation is entirely unavailing. Relying on this Court's opinion in *Gray v. Mississippi*, 481 U.S. 648 (1987), Richardson asserts that, because Noble was a *Witherspoon*-qualified[11] juror, the Court of Criminal Appeals erred in concluding that his improper exclusion for cause on non-*Witherspoon* grounds can be harmless. However, as the district court ably noted, it is beyond cavil that Noble's exclusion had nothing whatsoever to do with his views of capital punishment[12] and thus does

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[10] Richardson conceded to the lower court that the trial court's error of state law did not violate any federal constitutional right he possesses. *See* Memorandum of Law in Support of Petitioner's Motion for COA at 26 ("It is the CCA's holding of harmless error, and *not* the trial court's initial error, that violated Mr. Richardson's federal constitutional rights . . . ."). It defies logic, therefore, that a state appellate court's application of harmless error doctrine to non-constitutional error implicates a protected federal constitutional right.

[11] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[12] Richardson concedes that Noble's exclusion had nothing whatsoever to do with his views on capital punishment. *See* Petition at 23 ("Petitioner has never asserted that Mr. Noble was excused based on his views about the death penalty."). Thus, his concerns regarding a case of pretextual exclusion of *Witherspoon*-qualified jurors are entirely irrelevant. Further, and regardless, the trial

not come within the scope of this Court's concerns in either *Witherspoon* or *Gray*. That is, contrary to Richardson's assertions, *Witherspoon* and its progeny, including *Gray*, do not stand for the proposition that a defendant in a capital case has an affirmative constitutional right to retain *Witherspoon*-qualified jurors, much less an affirmative constitutional right to retain a juror who has prejudged the issue of guilt or innocence. Indeed, the scope of the decision in *Gray* was expressly limited to wrongful *Witherspoon* exclusion. *See also Ross v. Oklahoma*, 487 U.S. 81, 87 (1988) ("We decline to extend the rule of *Gray* beyond its context: the erroneous '*Witherspoon* exclusion' of a qualified juror in a capital case"). For all these reasons, the lower court correctly found this claim not worthy of COA because the district court's rejection of this claim under the AEDPA and *Teague v. Lane*, *supra*, was entirely correct. PA 1:5-6, 94-98, 100-01.

Finally, the sole federal constitutional issue arguably implicated in this case is whether Richardson's right to an impartial jury was violated. To that end, Richardson has never alleged, much less established, that any of the jurors who actually decided his fate were not impartial. *See also* PA 1:98-100.

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court's presumptively-correct finding of juror bias due to a preformed opinion regarding guilt or innocence obliterates any question of pretext.

CONCLUSION

For the foregoing reasons, the Director respectfully requests this Court to deny Richardson's petition for writ of certiorari.

Respectfully submitted,

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